Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1094 OF 2008 AND W-02–1095 OF 2008
ZAINUN ALI, MOHD HISHAMUDIN AND RAMLY ALI JJCA
5 JANUARY 2010

Civil Procedure — Res judicata — Principles for — Earlier suit discontinued without liberty to file afresh and consent judgment entered — Issues raised and reliefs sought in second suit same as earlier action — Estoppel for rem judicatum — Whether second suit abuse of process of the court and ought to be struck off

Civil Procedure — Striking out — Abuse of process of court — Issues raised and reliefs sought in second suit same as earlier action — Second suit barred by res judicata — Estoppel for rem judicatum — Second suit also time barred — Whether suit vexatious, frivolous, scandalous and abuse of process of the court — Whether ought to be struck out

Civil Procedure — Striking out — Application for — Limitation — Whether claim time barred — Whether suit amounted to abuse of process of court and ought to be struck off

The plaintiff/appellant was a company that had taken over the assets of the Co-operative Central Bank Ltd. The defendants/respondents were partners and advocates and solicitors practising under the firm M/s Nordin Hamid & Co. The appellant claimed against the respondent for the return of auction proceeds allegedly kept by M/s Nordin Hamid & Co pursuant to a foreclosure proceeding. On 27 November 2002, the appellant brought an action against the respondents to recover the auction proceeds ('the first suit'). On 25 August 2003, the appellant withdrew the first suit. Later, the plaintiff on 21 October 2004 filed the present action ('the second suit') against the partners of the firm to recover the same auction proceeds. The appellant's claims in both the first and second suits were identical. The respondents applied to strike out the second suit under O 18 r 19(1) of the Rules of the High Court 1980 on the ground of res judicata and limitation period. The learned judge struck out the second suit and hence these appeals.

Held, dismissing the appeals:

(1) In determining whether a statement of claim discloses a reasonable cause

of action or itself constitutes an abuse of process, the state of affairs to which the court must have regard is that which prevailed at the date the action is filed. The court is entitled to look at the history of the case, where there is likelihood of the action being res judicata, to determine if there is a cause of action. The plea of res judicata applies not only to points which the court was required to form an opinion on but also to every point in the litigation which the parties could have brought up at the time (see para).

(2) When a matter between two parties has been adjudicated and determined by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata as the determination or judgment becomes the truth between such parties. An estoppel for *rem judicatum* will be created as a result. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties in a subsequent proceeding. The court has the inherent jurisdiction to dismiss or strike out an action on the ground of res judicata (see para).

(3) The statements of claim filed in the first suit and the second suit were in substance identical, resting on the same facts and issues. In respect of the first suit, the appellant and the respondent entered into a consent judgment or order dated 25 August 2003. The first suit was withdrawn by the appellant 'without liberty to file afresh' with a notice of discontinuance to be filed within one week from the date of the consent order. A consent order could give rise to a plea of res judicata. The doctrine of estoppel as expounded in *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank* [1995] 3 MLJ 331 applied. To allow the appellant to file the second suit based on the same facts or substantially the same facts was unjust and grossly prejudicial to the respondents particularly when the counterclaim against the appellant had been withdrawn by the respondents (see para).

(4) The appellant's claim against the respondents both in the first and second suits was founded on contract. The second suit was filed after a period of more than six years from the date on which the cause of action accrued. Thus the second suit was time barred and should be struck out as being an abuse of the process of the court (see para).

[Bahasa Malaysia summary

Plaintif/perayu adalah sebuah syarikat yang telah diambil alih aset-aset Co-operative Central Bank Ltd. Defendan/responden merupakan rakan kongsi dan peguambela dan peguamcara yang beramal di bawah firma Tetuan Nordin Hamid & Co. Perayu menuntut terhadap responden untuk mendapat balik hasil lelongan yang dikatakan telah disimpan oleh Tetuan Nordin Hamid & Co berikutan prosiding halang tebus. Pada 27 November 2002, perayu telah

memulakan tindakan terhadap responden untuk mendapat balik hasil leongan itu ('guaman pertama'). Pada 25 Ogos 2003, perayu telah menarik balik guaman pertama itu. Kemudian, pada 21 Oktober 2004 plaintif telah memfailkan tindakan ini ('guaman kedua') terhadap rakan kongsi firma itu untuk mendapat balik hasil lelongan yang sama. Tuntutan perayu dalam kedua-dua guaman pertama dan kedua adalah sama. Responden telah memohon untuk membatalkan guaman kedua di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan res judicata dan tempoh had masa. Hakim yang bijaksana telah membatalkan guaman kedua dan justeru itu rayuan-rayuan berikut.

Diputuskan, menolak rayuan-rayuan:

(1) Dalam menentukan sama ada penyataan tuntutan menunjukkan kausa tindakan munasabah atau ia sendiri membentuk penyalahgunaan proses, keadaan urusan yang mana mahkamah perlu mengambilkira adalah yang berlaku pada tarikh tindakan itu difailkan. Mahkamah berhak melihat sejarah kes di mana terdapat kebarangkalian tindakan itu res judicata, bagi menentukan jika terdapat kausa tindakan. Pli res judicata bukan sahaja terpakai untuk poin-poin yang mana diperlukan mahkamah untuk membentuk pendapat pada dan setiap poin dalam litigasi yang mana mungkin boleh dibangkitkan oleh pihak-pihak pada masa itu (lihat perenggan).

(2) Apabila suatu perkara antara dua pihak telah diadili dan ditentukan oleh mahkamah yang mempunyai bidang kuasa kompeten, mereka dan mereka yang bersubahat tidak dibenarkan untuk membuat litigasi sekali lagi res judicata itu kerana penentuan atau penghakiman itu telah menjadi suatu kebenaran antara pihak-pihak. Estopel untuk *rem judicatum* akan terbentuk akibat daripada ini. Kausa tindakan estopel menghalang desakan penegasan semula kausa tindakan yang telahpun ditentukan dalam penghakiman akhir oleh pihak-pihak yang sama dalam prosiding seterusnya. Mahkamah mempunyai bidang kuasa sedia ada untuk menolak atau membatalkan tindakan atas alasan res judicata (lihat perenggan).

(3) Penyaaan tuntutan yang difailkan dalam guaman pertama dan guaman kedua pada dasarnya adalah sama, berasaskan fakta-fakta dan isu-isu yang sama. Berhubung guaman pertama, perayu dan responden telah memasuki penghakiman persetujuan atau perintah bertarikh 25 Ogos 2003. Guaman pertama itu telah ditarik balik oleh perayu 'without liberty to file afresh' dengan notis pemberhentian untuk memfailkan dalam satu minggu daripada tarikh perintah persetujuan itu. Perintah persetujuan boleh menimbulkan pli res judicata. Doktrin estopel sebagaimana diputuskan dalam *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank* [1995] 3 MLJ 331adalah terpakai. Dengan

membenarkan perayu memfailkan guaman kedua berdasarkan fakta-fakta sama atau sebahagian besar merupakan fakta-fakta sama adlah tidak adil dan amat memudaratkan responden-responden khususnya apabila tuntutan balas terhadap perayu telah ditarik balik oleh responden-responden (lihat perenggan).

(4) Tuntutan perayu terhadap responden-responden dalam kedua-dua guaman pertama dan kedua berasaskan kontrak. Guaman kedua telah difailkan selepas tempoh lebih daripada enam tahun dari tarikh kausa tindakan terakru. Oleh itu guaman kedua telah luput had masa dan patut dibatalkan kerana merupakan satu penyalahgunaan proses mahkamah (lihat perenggan).]

Notes

For cases on abuse of process of court, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7245–7247

For cases on application for, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 7478–7481

For cases on principles, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 6791–6792

Cases referred to

Abdul Hamid bin Hj Rahmat & Anor v Development & Commercial Bank Bhd & Anor [1993] 1 MLJ 306, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331, FC (folld)

Cohen v Jonesco [1926] 1 KB 119 (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman & Ors [1996] 3 MLJ 259, CA (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (refd)

Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165, SC (refd)

Othman & Anor v Mek [1971] 2 MLJ 214 (refd)

Palmer and another v Durnford Ford (a firm) and another [1992] 2 All ER 122 (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)

In re South American and Mexican Company; Ex parte Bank of England [1895] 1 Ch 37, CA (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)

Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)

Appeal from: Civil Suit No S6–22–1600 of 2004 (High Court, Kuala Lumpur)

Lambert Rosa-Ratnam (CS Mong and Nicole Leong with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.

Zainur Zakaria (Sabarudin Othman & Ho) in Civil Appeal No W-02–1095 of 2008 for the respondents.

Indran Kumaraguru (Krishna Dallumah Maniam & Indran) in Civil Appeal No W-02–1095 of 2008 for the respondents.

Ramly Ali JCA (delivering judgment of the court):

[1] The plaintiff (the appellant in the present appeal) is a company that has taken over the assets of the Co-operative Central Bank Ltd ('CCB'). The defendants (the respondents in the present appeal) are all partners and advocates and solicitors practising under the firm name of M/s Nordin Hamid & Co during the period when the plaintiff's alleged cause of action arose.

[2] The appellant's claim against the respondent is for the return of auction proceeds allegedly kept by the Kuala Lumpur office of M/s Nordin Hamid & Co pursuant to a the foreclosure proceeding in Originating Summons No S6–31–3262 of 1987 wherein a property was auctioned on the 11 November 1996 for the sum of RM385,000. On or about the 18 November 1997 the sum of RM377,350 was allegedly paid to the Kuala Lumpur office of M/s Nordin Hamid & Co. It is the contention of the defendants that they were not aware of this payment into the firm's client's account at this date.

[3] On 27 November 2002, the appellant brought an action (Kuala Lumpur High Court Suit No D1–22–1943 of 2002) against the respondents to recover the auction proceeds (first suit).

[4] On 25 August 2003, the appellant withdrew the first suit. The withdrawal of the first suit was recorded in the notes of proceeding for that suit. The notes of proceeding for 25 August 2003 show that the court ordered the first suit and the firm's counterclaim be struck out, and the parties were directed to file a notice of discontinuance within one week. The court also ordered costs be agreed between the parties.

[5] After the first suit was withdrawn, the plaintiff on 21 October 2004 filed the present action (the subject matter of the present appeal) against the partners of the firm to recover the same auction proceeds. The appellant's claims in both the first and second suits are identical.

[6] On 18 February 2005, the respondents filed applications to strike out the second suit under O 18 r 19(1) of the Rules of the High Court 1980, on the ground of res judicata. The respondents in the first appeal (Appeal No W-02–1094 of 2008) also relied on limitation period in applying to strike out the second suit. On 29 August 2008, the learned judge struck out the second suit. Hence the present appeals.

THE APPELANT'S ARGUMENTS

[7] The appellant argued that the second suit is not barred by res judicata as it was withdrawn without the merits being heard or adjudicated by the court. To the appellant, cause of action estoppel and issue estoppel do not apply on the facts of this matter.

[8] The appellant also argued that the second suit is not barred by limitation; and the facts necessary for a considered decision on whether the second suit is time barred have to be determined at trial. Thus the appellant concluded that this is not a plain and obvious case to be summarily struck out.

THE RESPONDENT'S ARGUMENTS

[9] The respondents on the other hand, took the position that since the first suit was withdrawn by the appellant by way of a consent order, this fact by itself has given rise to two grounds for striking out ie res judicata or issue estoppel and limitation period which are legal issues arising from the same set of facts. The respondents claimed that the appellant's own pleadings state that their cause of action arose on or about the 1 December 1997 and would therefore have expired on the 30 November 2003, whereas the second suit was filed on 21 October 2004.

FINDINGS OF THE COURT

[10] Under O 18 r 19(1) of the Rules of the High Court 1980, the court may at any stage of the proceedings order to be struck out any statement of claim and writ summons in an action on the ground that it discloses no reasonable cause of action; it is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the court.

[11] In the present case, the court finds that the principles that are applicable for the striking out of the second suit are:

(a) res judicata; and

(b) limitation.

ISSUE OF RES JUDICATA

[12] In determining whether a statement of claim discloses a reasonable cause of action or itself constitutes an abuse of process, the state of affairs to which the court must have regard is that which prevailed at the date the action is filed (see Court of Appeal decision in *Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman & Ors* [1996] 3 MLJ 259). The court is entitled to look at the history of the case, where there is likelihood of the action being res judicata, to determine if there is a cause of action (see *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 and *Abdul Hamid bin Hj Rahmat & Anor v Development & Commercial Bank Bhd & Anor* [1993] 1 MLJ 306).

[13] The plea of res judicata applies not only to points which the court was required to form an opinion on but also to every point in the litigation which the parties could have brought up at the time (see *Othman & Anor v Mek* [1971] 2 MLJ 214).

[14] In addition, the court possesses an inherent jurisdiction to prevent an abuse of its process (see *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC)). The use of the court process must be bona fide.

[15] When a matter between two parties has been adjudicated and determined by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata as the determination or judgment becomes the truth between such parties. An estoppel for rem judicatum has been created as a result (per Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189). The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties in a subsequent proceeding. The court has the inherent jurisdiction to dismiss or strike out an action on the ground of res judicata.

[16] In the present case, the statement of claim that was filed by the appellant in the first suit and the statement of claim filed in the second suit asked for the same remedy ie for damages and the refund of the action proceeds. Both statements of claim in both the first and second suits are in substance identical, resting on the same facts and issues.

[17] In respect of the first suit, the appellant and the respondents entered into a consent judgment or order dated 25 August 2003 to the effect 'inter alia' that 'ADALAH JUGA DIPERINTAHKAN SECARA PERSETUJUAN

bahawa tindakan ini dibatalkan dan kos dipersetujui di antara kedua-dua pihak dan jikalau kos tidak dapat dipersetujui oleh kedua-dua pihak ianya ditaksirkan'.

[18] There is no mention about the first suit being withdrawn 'with liberty to file afresh' in the said consent order.

[19] Before the consent order was recorded on 25 August 2003, the appellant sent a letter dated 12 August 2003 to the defendants to say that the appellant withdrew their application for summary judgment (which was fixed for hearing on 25 August 2003) and ceased all legal actions in respect of the matter 'without liberty to file afresh' with no order as to costs. On that understanding the respondents agreed to withdraw the counterclaim filed against the appellant.

[20] Subsequent to the above, a draft notice of discontinuance was prepared by the appellant's counsel and approved by the respondents' counsel which reads as follows:

> Ambil perhatian bahawa plaintif yang dinamakan di atas memberhentikan keseluruhan tindakan terhadap defendan tanpa hak kebebasan untuk memfailkan semula terhadap defendan atau kongsi firma tersebut dengan kos yang akan ditaksirkan atau dipersetujui.

[21] The matter came up for hearing on the 25 August 2003 in chambers before the learned senior assistant registrar, Puan Wan Liza bt Md Amin. The relevant notes of proceeding read as follows:

> Hari ini untuk pendengaran tuntutan, plaintif pohon tarik balik kerana pihak telah menulis surat pada pihak dengan persetujuan peguamcara …
>
> Defendan juga memohon menarik balik tuntutan balas.

[22] In the premise, the correspondences and the notes of proceeding clearly show that the first suit was withdrawn by the appellant 'without liberty to file afresh' with a notice of discontinuance to be filed within one week from the date of the consent order.

[23] It is trite that a consent order could give rise to a plea of res judicata. There are a number of authorities on this point. Among them are: *Palmer and another v Durnford Ford (a firm) and another* [1992] 2 All ER 122; *Cohen v Jonesco* [1926] 1 KB 119; *In re South American and Mexican Company; Ex parte Bank of England* [1895] 1 Ch 37; and *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165.

[24] The consent order in the present case is founded on a contract or agreement between the parties based on both parties' willingness to submit to the discontinuance of the first suit on certain terms. Once the appellant and the respondents took the matter beyond contract and recorded a consent order then they must accept all the implications of a court judgment or order. In this sense the court now cannot vary the terms of the order. The application by the respondents for striking out the second suit under O 18 r 19 was in effect to enforce the terms of the agreement or contract and the said consent order.

[25] It must be noted that the appellant's letter dated 12 August 2003 to the respondents clearly proposed that the first suit be withdrawn 'without liberty to file afresh'. The respondents' reply to that letter, also affirmed that the said withdrawal was 'without liberty to file afresh'. The consent order dated 25 August 2003 also made no mention that the first suit was withdrawn 'with liberty to file afresh'. On the above strength and understanding, the respondents also withdrew their counterclaim against the appellant. It was a clear representation that there would be closure of the matter. Thus the doctrine of estoppel as expounded in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331 is applicable in the present case. The appellant ought to be estopped from filing the second suit against the respondents. In the circumstances, to allow the appellant to file a fresh action (the second suit) based on the same facts or substantially the same facts would be unjust and grossly prejudicial to the respondents particularly when the counterclaim against the appellant had been withdrawn by the respondents.

[26] As clearly stated in the commentary on *Dismissal by Consent*, in Atkins, Vol 10 at p 46, an order of dismissal or striking out can be made by consent. If an order is made pursuant to the terms of settlement, that an action be dismissed or struck out by consent, the effect is not only to put an end to that action but also to preclude the plaintiff from bringing fresh proceedings based on the same cause of action. It operates as a judgment against the plaintiff and acts as an estoppel by record.

[27] In the present case, the appellant had agreed to withdraw their action and the respondents had agreed to withdraw their counterclaim. There was a compromise between these parties which culminated in a consent order being recorded by the learned senior assistant registrar before whom both parties were represented by their own respective counsel. The court must therefore give full recognition to the consent order. To allow the appellant to proceed with the second suit is clearly an abuse of the process of the court.

[28] Based on the above considerations, the court is satisfied that on this ground of res judicata alone, the present appeals are clearly without merit and

thus ought to be dismissed.

ISSUES OF LIMITATION

[29] For completeness the court shall now deal with the issue of limitation as raised by the respondents in the present appeals.

[30] Section 6(1)(a) of the Limitation Act 1953 provides that an action founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[31] The appellant's claim against the respondents both in the first and second suits is founded on contract. Thus the applicable limitation period is six years for the date of the accrual of the cause of action.

[32] In general, in determining the limitation period under the Limitation Act, time begins to run when the cause of action accrues. A cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when there are present all the facts which are material to be proved to entitle the plaintiff to succeed. Where the defendant has pleaded that the action is time barred, the burden is on the plaintiff to prove that the relevant limitation has not expired (see *Halsbury's Laws of England*, (4th Ed), Vol 28, paras 820 and 847).

[33] It is clear from appellant's statement of claim that they regard the dates 18 November 1997 or the 1 December 1997 as the cause of action against the respondents in the first suit and in this present second suit, since they are specifically claiming damages and interests from this date. It is therefore settled law that for the purpose of the Limitation Act the cause of action against the respondents arose from the date the cause of action accrued which is either 18 November 1997 or 1 December 1997, which has been pleaded by the appellant in the statement of claim.

[34] The present second suit was filed afresh on 21 October 2004 ie after a period of more than six years from the date on which the cause of action accrued (18 November 1997 or 1 December 1997). Thus the limitation of the appellant's second suit has set in. Thus the second suit is time barred. Therefore, the second suit should also be struck out as being an abuse of the process of the court.

CONCLUSION

[35] For the above reasons, we unanimously dismiss both the appeals

(W-02–1094 of 2008 and W-02–1095 of 2008) with costs of RM10,000 (for both appeals) to the respondents. The order of the High Court dated 29 August 2009 is affirmed. Deposit to the respondents on account of costs.

Appeals dismissed.

Reported by Kanesh Sundrum